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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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UNITED AIR LINES, INC.,

*Petitioner,*

*vs.*

THE DIVISION OF INDUSTRIAL SAFETY OF THE DEPARTMENT OF INDUSTRIAL RELATIONS OF THE STATE OF CALIFORNIA and THE OCCUPATIONAL SAFETY & HEALTH APPEALS BOARD FOR THE STATE OF CALIFORNIA,

*Respondent.*

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## REPLY OF PETITIONER UNITED AIR LINES, INC. TO MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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Petitioner United Air Lines, Inc. (hereinafter "United") herein responds to the memorandum submitted by the Solicitor General for the United States (hereinafter "Solicitor General") as *amicus curiae* which opposes United's petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

This is a unique case in which United seeks to determine the statutory line of demarcation between the federal jurisdiction of the Federal Aviation Administration ("FAA") and the state jurisdiction of California's equivalent of the Federal

Occupational Safety and Health Administration, the California Department of Industrial Relations, Division of Industrial Safety,[1] and the Occupational Safety and Health Appeals Board (collectively, "CAL/OSHA"). The measurement of that jurisdiction depends entirely on the scope of actively exercised FAA jurisdiction under the Federal Aviation Act of 1958, 49 U. S. C. §§ 1301 *et seq.* The California legislature recognized that dependency in restricting CAL/OSHA's jurisdiction to those "places of employment" not within the FAA's actively exercised jurisdiction. California Labor Code § 6303a.[2]

The issue before the Court is whether the Appellate Court erred in failing to find that a federal question was stated in United's complaint for declaratory and injunctive relief from pervasive and unlawful regulation of its facilities by CAL/OSHA. United submits that a federal question is implicit in the circumstances in which this case arose and was explicitly set forth in the complaint.

This reply will focus briefly on two assertions by the Solicitor General:

1. That United's complaint stated a federal question only as an anticipated defense to the enforcement of state laws; and

2. That section 18 of the Occupational Safety and Health Act ("OSH Act"), 29 U. S. C. § 667, authorizes a state to exercise jurisdiction which the OSH Act would deny to the Federal Occupational Safety and Health Administration ("FED/OSHA").

Neither of these assertions by the Solicitor General is correct.

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[1] This Division is now known as the Division of Occupational Safety and Health.

[2] The ultimate question in this case is whether or not the FAA has and exercises statutory authority over the safety of an airline's ground employees while performing maintenance on aircraft or aircraft components. That question was not reached by the Ninth Circuit because it found federal question jurisdiction to be lacking.

## I.

## THE NINTH CIRCUIT AND NOW THE FEDERAL GOVERNMENT ERRONEOUSLY CHARACTERIZE UNITED'S ACTION AS RAISING A FEDERAL QUESTION ONLY AS AN ANTICIPATED DEFENSE TO CAL/OSHA ENFORCEMENT

It is obvious that any desired result can be supported merely by manipulating the facts. Characterizing United's action as merely a defense to enforcement is factually inconsistent with the complaint. This action for declaratory and injunctive relief from unlawful regulation is far more comprehensive than merely a defense to any particular enforcement.

United's verified complaint (Appendix pp. 14a-24a)[3] sought exemption for its maintenance and operations facilities from CAL/OSHA's entire regulatory process, i.e. from the "regular and repeated inspection, regulation and attempts at enforcement" of CAL/OSHA's purported authority under California Labor Code, §§ 148-49, 6300 *et seq.* This suit represents a serious effort to harmonize the scope of CAL/OSHA's regulation with that of FED/OSHA's in the face of exercised FAA jurisdiction over the actual day-to-day activities at United's operations and maintenance facilities.

If United is correct in its construction of the scope of jurisdiction exercised by the FAA,[4] CAL/OSHA's repeated assertion of its jurisdiction is beyond its authority and subject to injunctive relief. Under CAL/OSHA's own oganic statute, its

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[3] The reference is to the Appendix filed as part of United's Petition for Writ of Certiorari.

[4] Recent decisions of the Federal Occupational Safety and Health Review Board are in accord with United's view of FAA authority. *Northwest Airlines, Inc.*, 1980 CCH OSHD para. 24,751 (1980); *American Airlines, Inc.*, 1981 CCH OSHD para. 25,225 (1981). See *infra*.

jurisdiction and authority are entirely dependent on the breadth of jurisdiction given to the FAA by an Act of Congress, and actively exercised by that agency. Thus, by this action United is not defending against any particular enforcement proceedings; rather, it is seeking declaratory and injunctive relief from any improper exercise of jurisdiction by CAL/OSHA in those "places of employment" where such jurisdiction is exercised by the FAA.

## II.

## CAL/OSHA'S JURISDICTIONAL LIMITS CANNOT EXCEED FED/OSHA'S

United has argued in its Petition for Writ of Certiorari that CAL/OSHA's jurisdiction cannot be broader than FED/OSHA's since: (1) the OSH Act effectively preempted all state authority in the field of employee safety and health subject to the potential resumption of such responsibility pursuant to a federally approved plan, 29 U. S. C. § 667, and (2) the requirement that approved state plans impose standards which are at least as effective as federal standards cannot be read to expand the effective jurisdiction of the state agency beyond that provided by the OSH Act from which it is spawned. By the express language of the federal statute, FED/OSHA may not exercise its authority where, as here, another federal agency (FAA) has jurisdiction. 29 U. S. C. § 653(b)(1).

The Solicitor General now argues that the effect of 29 U. S. C. § 667 is merely to "remove the federal preemption so that states may exercise their sovereign powers over occupational safety and health". Memorandum for the United States, p. 5. It is astounding that the Solicitor General should endorse an interpretation of the federal statutory scheme which would permit the exercise of FAA authority over employee safety and health to have a different jurisdictional effect in each state based solely on whether the OSH Act or the state's own approved

plan governs the regulation of employee safety and health.[5] If such a view were upheld, Northwest Airlines and American Airlines, like United, would have different safety and health regulatory obligations in California than in other states despite the clear decisions of the Occupational Safety and Health Review Commission in *Northwest Airlines, Inc.*, 1980 CCH OSHD, para. 24,751[6] and *American Airlines, Inc.*, 1981 CCH OSHD, para. 25,225 (February 27, 1981), which rejected FED/OSHA's jurisdiction in airplane service and hangar areas. Yet, in both the *Northwest* and *American* cases, FAA safety and health jurisdiction over airline employees performing aircraft maintenance was held to be statutorily based and actively exercised through the FAA's manual requirements. No practical scheme of federalism should countenance differing preemptive effects caused by the same FAA exercise of jurisdiction in different states.

Finally, both Respondent and the Solicitor General assert that United disclaimed reliance on a federal preemption argument before the U. S. Court of Appeals. Petitioner's Brief in Opposition, 7-8, 11-12, Memorandum of the United States, 5 n.3. That assertion suggests a callous misreading of United's position before the Ninth Circuit. There, United did not need to argue an implied federal preemption because CAL/OSHA's own statute clearly recognized such a preemptive effect where the FAA actively exercised its jurisdiction.[7] Thus, as between

[5] The Solicitor General even goes so far as to claim that a state program need not provide for any exemption to preclude dual regulatory jurisdiction, a proposal clearly at odds with the legislative intent of the OSH Act.

[6] The decision in *Northwest Airlines, Inc.*, is set out in the Appendix to United's petition for writ of certiorari at pp. 54a-84b.

[7] The FAA has long preempted the field of aviation safety under 49 U. S. C. § 1421. Whether employee safety while performing aircraft maintenance is within the scope of the FAA's authority is, of course, one of the principal issues in United's suit although the Ninth Circuit found no federal question in the complaint.

CAL/OSHA and the FAA, the state statute itself provides an exemption. California Labor Code § 6303(a). Accordingly, United's argument for reversal of the Ninth Circuit by this Court is based on both (1) the statutory exemption automatically triggered by the preemptive exercise of FAA jurisdiction and (2) the federal preemption by FED/OSHA of the authority of all state agencies with regard to employee safety and health, which preemption is complete and comprehensive except for, and only to the extent of, FED/OSHA's subsequent approval of a state plan. Thus, on the one hand, United has not seen the need to argue for federal preemption by the FAA with respect to CAL/OSHA because of the state statute. On the other hand, United has expressly argued that federal preemption by FED/OSHA with respect to matters of safety and health necessarily determine the limits of CAL/OSHA's authority. It is CAL/OSHA's derivative authority which cannot exceed the authority of FED/OSHA. United submits that the statutory exemption from CAL/OSHA regulation caused by the exercise of FAA jurisdiction cannot lawfully be narrower than the statutory exemption from FED/OSHA regulation caused by the same exercise of FAA jurisdiction in other states.

WHEREFORE, petitioner United Air Lines, Inc. prays that its petition for a writ of certiorari, filed March 2, 1981, be granted.

Respectfully submitted,

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